Supreme Court, U.S.
F I L E D

99 300 AUG 18 1999

OFFICE OF THE CLERK

No. 99-

IN THE
SUPREME COURT OF THE UNITED STATES

COASTAL FUELS OF PUERTO RICO, INC.,
Petitioner,

v.

CARIBBEAN PETROLEUM CORPORATION,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

Michael S. Yauch
Nine Greenway Plaza
Suite 822A
Houston, Texas 77046
(713) 877-6849

Theodore N. Miller
Mark E. Haddad*
SIDLEY & AUSTIN
555 West 5th Street
Los Angeles, California 90013
(213) 896-6604

Counsel for Petitioner
Coastal Fuels of Puerto Rico, Inc.

August 18, 1999

****Counsel of Record***

QUESTIONS PRESENTED

1. Whether a plaintiff that has proven both an antitrust violation and the fact of antitrust injury, each by a preponderance of the evidence, is entitled to a lesser standard of proof with respect to the amount of damages.

2. Whether a plaintiff that has proven that it was driven out of business by anticompetitive conduct may be presumptively foreclosed from recovering the profits it would have earned had it not been driven out of business.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

The caption identifies the only two parties to this matter.

Petitioner Coastal Fuels of Puerto Rico, Inc., is a subsidiary of Coastal Fuels Marketing, Inc., which is a subsidiary of Cosbel Petroleum Corporation, which is a subsidiary of The Coastal Corporation, the stock of which is publicly traded.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING AND
RULE 29.6 DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

FACTUAL BACKGROUND 2

PROCEDURAL BACKGROUND 4

REASONS FOR GRANTING THE PETITION 11

CONCLUSION 22

TABLE OF AUTHORITIES

CASES

Addington v. *Texas*,
441 U.S. 418 (1979) 13

Arnott v. *American Oil Co.*,
609 F.2d 873 (8th Cir. 1979) 20

Bigelow v. *RKO Radio Pictures, Inc.*,
150 F.2d 877 (7th Cir. 1945), *rev'd*,
327 U.S. 251 (1946) 13

Bigelow v. *RKO Radio Pictures, Inc.*,
327 U.S. 251 (1946) ..... *passim*

Eastman Kodak Co. v. *Southern Photo Materials Co.*,
273 U.S. 359 (1927) 14,18

Farmington Dowel Prods. Co. v. *Forster Mfg. Co.*,
421 F.2d 61 (1st Cir. 1970) 9,16

Fishman v. *Estate of Wirtz*,
594 F. Supp. 853 (N.D. Ill. 1984), *aff'd in relevant part*,
807 F.2d 520 (7th Cir. 1986) 20

Fishman v. *Estate of Wirtz*,
807 F.2d 520 (7th Cir. 1986) 16

Graphic Prods. Distribs., Inc. v. *ITEK, Corp.*,
717 F.2d 1560 (11th Cir. 1983) 17

J. Truett Payne Co. v. *Chrysler Motors Corp.*,
451 U.S. 557 (1981) 14

Lehrman v. *Gulf Oil Corp.*,
500 F.2d 659 (5th Cir. 1974) 17,19

National Farmers' Org., Inc. v. *Associated Milk Producers, Inc.*, 850 F.2d 1286 (8th Cir. 1988) 15

Palmer v. *Connecticut Ry. & Lighting Co.*,
311 U.S. 544 (1941) 18

Pierce v. *Ramsey Winch Co.*,
753 F.2d 416 (5th Cir. 1985) 14,15

Sinclair Ref. Co. v. *Jenkins Petroleum Process Co.*,
289 U.S. 689 (1933) 12,17,18,19,21

Southern Pines Chrysler-Plymouth, Inc. v. *Chrysler Corp.*,
826 F.2d 1360 (4th Cir. 1987) 19,20

Story Parchment Co. v. *Paterson Parchment Paper Co.*,
282 U.S. 555 (1931) 10,12,13,15,17

Terrell v. *Household Goods Carriers' Bureau*,
494 F.2d 16 (5th Cir.1974) 20

Texaco Inc. v. *Hasbrouck*,
496 U.S. 543 (1990) 14

Zenith Radio Corp. v. *Hazeltine Research, Inc.*,
395 U.S. 100 (1969) 14

FEDERAL AND TERRITORIAL STATUTES

15 U.S.C. § 13(a) 2,4,5

Puerto Rico Anti-Monopoly Act, Laws of Puerto Rico, tit. 10, § 263 2,4,5

OTHER AUTHORITIES

H. Hovenkamp, *Federal Antitrust Policy* (1994) 17

R. Dunn, *Recovery of Damages for Lost Profits* (5th ed. 1998) 20

IN THE
SUPREME COURT OF THE UNITED STATES

COASTAL FUELS OF PUERTO RICO, INC.,
Petitioner,

v.

CARIBBEAN PETROLEUM CORPORATION,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 175 F.3d 18 (1st Cir. 1999), and is reprinted in the appendix ("Pet. App.") at page 1a. The opinions of the court of appeals denying rehearing and rehearing in banc are unpublished, and are reproduced at Pet. App. 35a-44a. The unpublished opinion of the district court appears in the appendix at Pet. App. 45a.

JURISDICTION

The court of appeals entered judgment on April 14, 1999 (Pet. App. 33a), and denied petitioner's petition for rehearing and suggestion for rehearing in banc on May 21, 1999 (*id.* at 37a). A subsequent petition for recall of the mandate, for rehearing, and suggestion for rehearing in banc was denied on

July 7, 1999. *Id.* at 41a-44a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are the Puerto Rico Anti-Monopoly Act, Laws of Puerto Rico, tit. 10, § 263(a), and the Robinson-Patman Act Amendments to the Clayton Act, 15 U.S.C. § 13(a). These provisions are set forth in the Appendix at Pet. App. 61a-65a.

STATEMENT OF THE CASE

This antitrust case, in which petitioner has proved that it was driven out of business by respondent's price discrimination, raises two "important damage[s] issues" (Pet. App. 1a):

(1) the standard of proof for proving the amount of damages once the fact of injury has been established, and

(2) the viability of a legal presumption against the recovery of future lost profits by a plaintiff that has been driven out of business by anticompetitive conduct.

FACTUAL BACKGROUND

Petitioner Coastal Fuels of Puerto Rico, Inc. ("Coastal") purchased residual and diesel fuel oil from respondent, Caribbean Petroleum Corporation ("CAPECO"), a large crude oil refiner. Coastal then blended the residual and diesel fuel to make marine fuel oil, which it sold to cruise ships and other vessels in San Juan Harbor. CAPECO's refinery, located on San Juan Harbor, was the only reasonable source for the large volume of residual and diesel fuel needed by marine fuel

suppliers in San Juan Harbor. Pet. App. 3a. Thus Coastal, as well as the two incumbent competitors at the time Coastal entered the marine fuel supply business in San Juan, Caribbean Fuel Oil Trading, Inc. ("Caribbean") and Harbor Fuel Services, Inc. ("Harbor"), were dependent upon CAPECO for this crucial input. *Id.*

Coastal's parent, Coastal Fuels Marketing, Inc. ("CFMI"), had 84 years experience in the marine fuel oil business. CFMI closely studied demand and competitive conditions in San Juan Harbor. (A.994-99 & 1002-46) Based on this study and experience, in the fall of 1991 CFMI's vice president for marine sales produced a detailed business plan for Coastal The business plan analyzed the total volume of marine fuel sales in San Juan, Coastal's expected share of that volume (based in part on expected sales to CFMI's existing cruise-ship customers in other ports who also purchased marine fuel oil in San Juan), and Coastal's expected margins per barrel sold (which assumed a competitive price-cutting response from Harbor and Caribbean). *Id.* This conservative analysis showed that Coastal would earn a profit of approximately $200,000 in 1992. Pet. App. 11a.

Coastal entered into the San Juan bunker fuel market in October 1991. Business began well, with Coastal meeting its anticipated sales volumes in both November and December, 1991, and thus rapidly achieving market shares in those months of 24% and 27%, respectively. Pet. App. 9a, (A.857-58). Disaster swiftly followed.

Despite CAPECO's assurances to Coastal that CAPECO would provide Coastal with residual and diesel fuel on the same terms and conditions as it offered to Harbor and Caribbean, CAPECO in fact granted Harbor and Caribbean deep discounts that it did not offer Coastal. Pet. App. 4a. Harbor and

Caribbean began passing these discounts on to their customers. *Id.* This systematic price discrimination precluded Coastal from effectively competing with Harbor and Caribbean for marine fuel sales. *Id.*

In April 1992, Coastal's president met with CAPECO's chief operating officers, who confirmed the price discrimination and refused to stop it. (A.1123-24). Coastal then filed this suit, seeking preliminary injunctive relief and damages. Pet. App. 4a. The price discrimination continued until April 1993, when the First Circuit affirmed the district court's denial of preliminary injunctive relief against the ongoing price discrimination. Pet. App. 4a-5a. Coastal then went out of business "'because of the price discrimination.'" Pet. App. 25a. Between October 1991 and April 1993, Coastal lost almost $2 million. *Id.* at 5a.

PROCEDURAL BACKGROUND

1. *The first jury trial:* Coastal's complaint alleged that CAPECO had discriminated in price in violation of the Robinson-Patman Act amendments to the Clayton Act, 15 U.S.C. § 13(a), and in violation of the Puerto Rico Anti-Monopoly Act, Laws of Puerto Rico, tit. 10, § 263(a); and that CAPECO had engaged in monopolization in violation of Section 2 of the Sherman Act and Section 260 of Title 10 of the Laws of Puerto Rico.[1]

Coastal, through the expert testimony of Robert Sherwin, sought more than $7 million in damages on these claims. Pet. App. 11a. During closing argument, CAPECO

---

[1]Coastal also alleged injury from tortious business conduct in violation of Puerto Rico law, and from breach of contract. Coastal's award of $500,000 on the tort claim was affirmed by the court of appeals, and neither that award nor the unsuccessful contract claim is at issue here. Pet. App. 2a.

informed the jury that any damages awarded Coastal would be trebled (see Dkt. 420); the district court denied Coastal's motion for a mistrial on this ground, and the jury found in favor of Coastal on all counts except the claim for breach of contract. Coastal was awarded $1.5 million in antitrust damages, which were trebled in accordance with 15 U.S.C. § 13(a) and Laws of Puerto Rico, tit. 10, § 263, for a total antitrust award of $4.5 million. Pet. App. 2a. The district court entered judgment for Coastal, and CAPECO appealed. *Id.*

2. The First Circuit affirmed in part, reversed in part, and remanded. 79 F.3d 182 (1996), *cert. denied*, 519 U.S. 927 (1996). The court affirmed the finding of liability for price discrimination,[2] but reversed the monopolization verdict. Pet. App. 2a. Because the jury had awarded a single amount -- $1.5 million -- for antitrust damages flowing from both monopolization and price discrimination, the court of appeals remanded for further proceedings to determine the amount of damages attributable to price discrimination alone. *Id.*

3. *The second jury trial*: On remand, CAPECO urged that a new trial was necessary not only as to the amount of damages Coastal sustained as a result of CAPECO's illegal price discrimination, but also as to CAPECO's liability and Coastal's injury in fact. Pet. App. 8a. Coastal maintained that the $1.5 million verdict could be sustained on the prior record under Rule 49(a). *Id.* The district court granted CAPECO's request

---

[2]The court affirmed the finding of price discrimination under the Puerto Rico Anti-Monopoly Act of 1964, but reversed under the Robinson-Patman Act, because the discriminatory sales did not cross a state line and therefore did not satisfy the federal "in commerce" requirement. In all other respects, however, Puerto Rico's Anti-Monopoly Act has been construed as equivalent to the Robinson-Patman Act for purposes of price discrimination, and hence the court of appeals has "analyz[ed] the case under the Robinson-Patman Act." Pet. App. 3a.

for a new trial, but held that the sole issue to be considered on remand is the amount of price discrimination damages to be awarded to Coastal. *Id.*

At the second trial, Sherwin testified that Coastal had suffered damages of nearly $8 million from price discrimination alone. Pet. App. 10a-11a. As in the first trial, his damages calculation had two principal components: (1) Coastal's lost profits from 1991-96, which included lost profits from 1991 to the time Coastal went out of business in 1993, as well as Coastal's lost "future" profits from 1993 through 1996; and (2) Coastal's going-concern value as of the end of 1996. *Id.* at 9a-11a.

To determine the amount of Coastal's lost profits, Sherwin compared Coastal's actual cash flows with the cash flows that Coastal would have realized in 1991-96 "but for" CAPECO's illegal price discrimination. Pet. App. 9a-12a. Sherwin's "but for" calculation relied upon projections of Coastal's market share, Coastal's gross margin, and Coastal's operating expenses. *Id.* at 11a, (A.429-38; A.1288-1320). Sherwin explained in detail the bases for these projections (A.455-525) and for his conclusion that the effect of price discrimination alone was sufficiently devastating to drive Coastal out of business in April, 1993. (A.416, 421, 424, 438-40); see Pet. App. 25a.

Sherwin's projections took account of real world events that occurred between 1991 and 1996 that would have affected Coastal's profitability in the absence of price discrimination. Pet. App. 11a. He accounted for the negative impact of the Puerto Rico excise tax on marine fuel sales, which was introduced in July 1992 (after Coastal's entry) and repealed in December 1993 (after Coastal's exit). *Id.* He accounted for other post-April 1993 events as well, including those that would

have increased Coastal's profits (such as Caribbean's exit from the market in the fall of 1993), as well as those that would have decreased Coastal's profits (such as CAPECO's temporary shutdown of its refinery in 1995). (A.417-40). Finally, Sherwin adjusted his calculations to exclude damages from anticompetitive conduct other than price discrimination which was redressable only under theories of monopolization or tort law. Pet. App. 24a-27a & n.9. His calculations resulted in a lost profits estimate of $3,475,000 from 1991-96. *Id.* at 10a.

Sherwin then calculated Coastal's going-concern value absent CAPECO's price discrimination as of the end of 1996. *Id.* at 11a. A firm's going-concern value is the price a "willing buyer" would pay for the firm at a given time; it thus reflects a third party's estimate of the firm's future profitability. *Id.* at 12a. Both parties' economic experts testified that going-concern value must be calculated at a time of market stability. Pet. App. 17a & n.6. Sherwin chose the year 1996 as a time sufficiently removed from such destabilizing events as the excise tax and CAPECO's price discrimination to conclude that the market had stabilized. *Id.* at 11a. Sherwin calculated Coastal's going-concern value by multiplying an appropriately derived "going-concern multiple" times the firm's earnings in an appropriate year, and then discounting the amount to present value. (A.1326-27). Sherwin determined that Coastal's going-concern value as of the end of 1996 would have been $4,490,000. Pet. App. 10a-11a.

Sherwin's damages testimony was endorsed by that of Professor Bradford Cornell, an expert in corporate valuation and the author of a leading work in that field. Pet. App. 9a-10a. Dr. Cornell testified that Sherwin's use of a "but for" market-forecast methodology to calculate lost profits from 1991-1996 was "very standard and conceptually correct." (A.1201). He confirmed the validity of Sherwin's method of calculating going-

concern value and the reasonableness of the multiple, and explained that it is "not only reasonable" but "necessary" to apply a multiple only "when a business is up and operating at an equilibrium state, business as usual." (A.1206).

The jury was instructed that "'in computing future profits, the law provides that the plaintiff may recover his lost profits from the date it cease[s] doing business . . . until a date at or near trial, and in addition its going-concern value as of that day.'" Pet. App. 13a. With regard to the burden of proof, the jury was instructed that "Coastal must prove the amount of its damages." *Id.* at 58a. With respect to the standard of proof, the jury was instructed in pertinent part as follows:

> At the beginning of the case I mentioned to you preponderance of the evidence. You must put that out of your mind, because in a price discrimination case such as this one, a lesser standard is applied because the most elementary conceptions of justice require that the wrongdoer shall bear the risk of the uncertainty which his own conduct has created. . . . So Coastal must produce evidence from which you, the jury, can make a just and reasonable inference as to the amount of damages. . . . You may not, however, calculate damages based solely on speculation or guesswork.[3]

The district court barred CAPECO in the second trial from telling the jury at any point that the damages would be

---

[3]The entire instruction on the standard of proof is set out at Pet. App. 59a. The reference at the outset of the instruction to the "beginning of the case" is to a pretrial instruction that CAPECO requested and that the District Court gave, that erroneously instructed the jury that liability was still an issue in the case and was to be resolved under the preponderance-of-the-evidence standard. (A.938, 943-44).

trebled. The second jury returned a verdict for Coastal in the amount of $4.5 million, which was then trebled for a total antitrust judgment of $13.5 million. Pet. App. 2a.

The district court denied CAPECO's motions for judgment as a matter of law and for a new trial or remittitur of damages. CAPECO again appealed. Pet. App. 2a.

4. On appeal, the First Circuit reversed and remanded the case for yet a third jury trial on damages. Pet. App. 3a. The court found that the district court had erroneously instructed the jury in two respects.

First, the court held that it was error for the district court to instruct the jury that "'the law provides that the plaintiff may recover his lost profits from the date it cease[d] doing business [in 1993] until a date at or near trial, and, in addition, its going-concern value as of that day.'" Pet. App. 13a (alterations in original); see *id.* at 12a-23a. In so holding, the court relied on a prior First Circuit decision, *Farmington Dowel Products Co.* v. *Forster Manufacturing Co.*, 421 F.2d 61 (1st Cir. 1970), where the court had "required that plaintiff's damages be calculated as of the date plaintiff went out of business, as opposed to a date close to trial, some ten years later." Pet. App. 16a. The panel held that *Farmington Dowel* establishes a "framework" (*id.* at 18a) or "rule" (*id.* at 21a) that "going-concern value should be evaluated as of the time plaintiff goes out of business and actual lost profits awarded only up until that date." *Id.* at 18a. Under this rule, the "burden is on the plaintiff to show circumstances which warrant choice of some date other than the date the company went out of business and that the evidence . . . is not speculative." *Id.* at 19a. Reviewing the evidence under this new rule, the court concluded that Coastal had not met this "burden." *Id.* at 18a-23a. It therefore reversed and remanded for a third damages

trial in which "Coastal is confined to its actual lost profits as of the date it went out of business in 1993, plus its going-concern value calculated as of that date but for CAPECO's price discrimination." *Id.* at 23a.

Second, the court identified "another type of error in the jury instructions" having "to do with the burden of proof." Pet. App. 27a. The court held that it was error for the court "to expressly instruct the jury to disregard the preponderance-of-the-evidence standard and to apply a lesser standard." *Id.* at 28a. The court recognized that the district court had attempted to follow this Court's precedent in *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931), but attributed the district court's error to "[t]he confusion in this area [that] starts with the language of the 1931 Supreme Court decision in *Story Parchment*." Pet. App. 28a. In the court of appeals' view, *Story* stands only for the proposition that plaintiffs are allowed "some flexibility in proving the amount of damages relating to hypothetical events"; *Story* does not relieve plaintiffs from having "to show *probability* that the damages caused by the wrongdoer's misconduct fall within a reasonably estimated range of damages." *Id.* at 30a.

The court then expressly rejected several of CAPECO's other arguments, including its claim that the fact-of-injury issue also had to be retried (Pet. App. 31a-32a), and ordered yet another new retrial on damages only. *Id.* On May 21, 1999, the court denied Coastal's petition for rehearing (*id.* at 35a) and a majority of the judges in active service declined to order rehearing in banc.[4] *Id.* at 37a.

---

[4]Coastal subsequently petitioned for recall of the mandate and again for rehearing and rehearing in banc, because the mandate, unlike the judgment, contained new language reassigning this case to a new judge, thereby granting

(continued...)

REASONS FOR GRANTING THE PETITION

The panel correctly observed at the outset of its opinion that "this antitrust price-discrimination case raises . . . important damage issues." Pet. App. 1a. Indeed, at the heart of both issues on which the court of appeals reversed the judgment below is the fundamental question of whether the defendant bears the risk of uncertainty as to the amount of damages once the plaintiff proves, by a preponderance of the evidence, liability and the fact of antitrust injury. We believe this Court's precedents answer this question in the affirmative. The court of appeals, however, found "confusion" in the Court's precedent (*id.* at 28a), and proceeded to adopt two new rules of damages that conflict with that precedent and with decisions of the courts of appeals.

First, the court of appeals held that it was error for the district court to instruct the jury that plaintiff need not prove the amount of damages by a preponderance of the evidence. That holding conflicts with the decisions of this Court in *Story Parchment* and in *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), as well as with holdings of both the Fifth and Eighth Circuits, that a lesser standard of proof than a preponderance of the evidence applies to the amount of damages once the fact of injury is proven.

---

[4](...continued)
CAPECO relief in the mandate that CAPECO had expressly sought in its brief, but that had been denied in the panel opinion and judgment. *Compare* Pet. App. 39a (Mandate) *with id.* at 33a (Judgment) *and id.* at 32a (Opinion) ("we need not reach the myriad of other claims CAPECO has raised"). Without explanation of the non-conforming mandate, Coastal's subsequent petitions were denied on July 7, 1999. *Id.* at 41a-44a.

Second, the court of appeals established a new rule that places the burden on the plaintiff to overcome a legal presumption that damages for the loss of plaintiff's business due to anticompetitive conduct are limited to the going-concern value of that business at the time of its demise. This new rule improperly shifts the risk of uncertainty in calculating the amount of damages from defendant to plaintiff in contravention of *Story Parchment*. The rule also conflicts with this Court's holding in *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.*, 289 U.S. 689 (1933), that damages for the wrongful loss of property may not be limited to an hypothesized sale of the property at the time of loss. Finally, the holding conflicts with the decisions of several circuit courts of appeals -- one of which provided the language of the district court's instruction.

I.

"The most elementary conceptions of justice and public policy require that the *wrongdoer shall bear the risk* of the uncertainty which his own wrong has created." *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251, 265 (1946) (emphasis added). It is this bedrock principle that supports this Court's decisions in *Story Parchment*, *Bigelow*, and numerous other cases, and which the First Circuit's two new damages rules squarely violate.

1. In *Story Parchment*, as in this case, "there was uncertainty as to the extent of the damage, but there was none as to the fact of damage." 282 U.S. at 562. The uncertainty as to the extent of damage had led the First Circuit in *Story* to conclude that no damages could be awarded. This Court reversed, holding that "there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount." *Id.* Accordingly, "while

the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate." *Id.* at 563.

Although the Court in *Story Parchment* did not say, in so many words, that a plaintiff, having proved the fact of injury by a preponderance of the evidence, need not prove the amount of injury by a preponderance of the evidence, that is the plain import of its decision. The Court emphasized that once the plaintiff proves the fact of injury, "the risk of uncertainty should be thrown upon the wrongdoer instead of upon the injured party." *Id.* (quoting numerous cases to the same effect). The very "function of a standard of proof . . . is to *allocate the risk of error* between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington* v. *Texas*, 441 U.S. 418, 423 (1979) (emphasis added) (citation omitted). Because the preponderance standard places the risk of uncertainty in proving the fact of injury on the plaintiff, the only way to have that risk "thrown upon the wrongdoer" once injury is shown, is to relieve the plaintiff of having to prove the amount of damages by that same preponderance standard.

The Court's decision in *Bigelow* confirms that *Story Parchment* relieves an antitrust plaintiff from having to prove the amount of damages by a preponderance of the evidence. In *Bigelow*, which involved an antitrust conspiracy to reduce competition among movie theaters, "[t]he sole question for decision" was "whether the evidence of damage [was] sufficient to support the verdict." 327 U.S. at 254. The Seventh Circuit had reversed because, in its view, "[t]he jury must base their verdict upon a preponderance of all the competent evidence," a standard that the court of appeals found plaintiffs had failed to satisfy. *Bigelow* v. *RKO Radio Pictures, Inc.*, 150 F.2d 877, 883 (7th Cir. 1945). This Court rejected the Seventh Circuit's

approach. Relying on *Story Parchment*, the Court held that it is "a well settled principle" that the jury can reach its conclusions "as a matter of just and reasonable inference," and reinstated the jury's award. *Bigelow*, 327 U.S. at 264.

Under *Story Parchment* and *Bigelow*, then, the preponderance standard applicable to the fact of injury is not applicable to the amount of injury. The damages principles expressed in *Story* and *Bigelow*, moreover, are an integral part of this Court's damages jurisprudence. See, *e.g.*, *Texaco Inc.* v. *Hasbrouck*, 496 U.S. 543, 573 (1990); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969); *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927).[5] The jury instruction given below -- which stated that the preponderance standard was inapplicable and that damages must be proved by a just and reasonable inference -- conformed precisely to this Court's precedent.

2. In holding that plaintiffs must prove not only the fact but also the amount of damage by a preponderance of the evidence, the First Circuit placed itself in conflict with decisions of both the Fifth and Eighth Circuits. In *Pierce* v. *Ramsey Winch Co.*, 753 F.2d 416 (5th Cir. 1985), the Fifth Circuit set forth the implications of *Story Parchment* for the standard of proof of the amount of damages. The Fifth Circuit began by observing that "an antitrust plaintiff must prove by a preponderance of the evidence some 'element of actual damage caused by the defendant's violation of the antitrust laws.'" *Id.* at 435. The court then explained that "[o]nce the fact of

---

[5] *See also J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 570 (1981) (Powell, J., dissenting in part) (although the "plaintiff has the burden of proving the fact of antitrust injury by a preponderance of the evidence," once injury has been proven, "a court [may] properly be lenient in the evidence it requires to prove the amount of damages.").

damage has been established, plaintiff enjoys a relaxed burden with respect to the amount of damages." *Id.* In particular, the court noted, "[u]nder this relaxed burden, a jury verdict may stand on less evidence than is normally required to support a damage award in civil cases. While rank speculation will not be tolerated, '[e]vidence sufficient to support a "just and reasonable inference of damages suffices."'" *Id.* (citation omitted) (second alteration in original).

The conflict with the Eighth Circuit is equally plain. In *National Farmers' Org., Inc.* v. *Associated Milk Producers, Inc.*, 850 F.2d 1286, 1292-93 (8th Cir. 1988), the court of appeals stressed that although antitrust liability issues, including the fact of injury, "must be established by a preponderance of the evidence, a *lesser standard of proof* is applicable to proof of the *amount* of damage." (first emphasis added) (citing, *inter alia*, *Story Parchment Co.* v. *Patterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931)). The Eighth Circuit therefore held that, "in proving the *amount* of damage, the antitrust plaintiff need only present evidence from which the fact finder may make a just and reasonable estimate of the damage that is not based on speculation or guesswork." *Id.* at 1293.

The jury instruction held to be erroneous here is virtually a verbatim recitation of the holdings in *Pierce* and *National Farmers'* that the preponderance standard is inapplicable once the fact of injury is proven, plus a verbatim recitation of the proper "just and reasonable inference" standard and reasons therefore as set forth in those cases and in *Story Parchment*. Compare Pet. App. 59a (jury instruction) with *Story Parchment*, 282 U.S. at 562-63, and *Pierce*, 753 F.2d at 435, and *National Farmers'*, 850 F.2d at 1292-93. There can be no question, therefore, that if this case had been tried to a jury in either the Fifth or Eighth Circuits, the instruction would not have been held erroneous; indeed, the *failure* to give that

instruction might well have been error. The standard of proof for the amount of antitrust damages is a question of fundamental national importance. The First Circuit's unequivocal and erroneous departure from the clear import of this Court's prior decisions and from the decisions of other circuits therefore warrants plenary review by this Court.

II.

The First Circuit's decision to establish a new legal presumption against the recovery of lost future profits similarly "ignores controlling principles of the law of damages." *Bigelow*, 327 U.S. at 261. The panel transformed one of its prior decisions, *Farmington Dowel*, that had been viewed as an outlier distinguishable on its facts,[6] into an unprecedented and erroneous "rule" (Pet. App. 21a) of damages law. In the First Circuit, a plaintiff that has been driven out of business by anticompetitive conduct is now presumptively foreclosed from recovering the profits it would have earned had it stayed in business. Unless it can overcome the presumption, that plaintiff is limited to recovery of its going-concern value, that is, "what a willing buyer would have paid" for the business, at the time of its demise. *Id.* at 23a. This holding runs counter to this Court's precedents, to other circuit decisions, and to common sense.

1. Until the panel's decision, it was "established beyond peradventure that going concern value and lost future

---

[6] *Compare Fishman* v. *Estate of Wirtz*, 807 F.2d 520, 551-52 (7th Cir. 1986) (distinguishing *Farmington* as based on the lack of admissible evidence of damages), *with Farmington Dowel Prods. Co.* v. *Forster Mfg. Co.*, 421 F.2d 61, 81-82, 84-85 (1st Cir. 1970) ("Any inadequacy which may have resulted should be attributed to Farmington's own presentation of its case.").

profits are valid alternative measures of antitrust damages."[7] A plaintiff was therefore free to choose between seeking lost future profits (which was advantageous if events subsequent to the loss of the business would have improved plaintiff's profitability, or if the plaintiff's unique attributes made the business more valuable to it than to third parties) or seeking going-concern value at the time of the loss of business (if subsequent events would have diminished plaintiff's profitability).

Of course, permitting the plaintiff to choose between these damages theories is disadvantageous to the defendant. But it is the sort of disadvantage that this Court has repeatedly confirmed to be not only appropriate but necessary to vindicate basic principles of justice once the fact of antitrust injury is established. The point of "throw[ing]" the "risk of the uncertainty" onto the "wrongdoer," *Story Parchment*, 282 U.S. at 563, is to ensure that damages rules do not "enable the wrongdoer to profit by his wrongdoing at the expense of his victim." *Bigelow*, 327 U.S. at 264. By restricting the plaintiff to going-concern value unless the *plaintiff* can make a showing of certainty of future profits that overcomes the First Circuit's legal presumption, the First Circuit has thrown the risk of uncertainty right back on the plaintiff -- precisely where it should not be.

Indeed, this Court squarely and unanimously rejected a litigant's attempt to establish a comparable rule against lost future profits in *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.*, 289 U.S. 689 (1933) (Cardozo, J.). The issue in

---

[7] *Graphic Prods. Distribs., Inc.* v *ITEK, Corp.*, 717 F.2d 1560, 1579 (11th Cir. 1983); *see, e.g., Lehrman* v. *Gulf Oil Corp.*, 500 F.2d 659, 663-64 (5th Cir. 1974) (same); H. Hovenkamp, *Federal Antitrust Policy* 624 (1994) (same).

Sinclair was how to calculate damages for the loss of the right to market a patent that -- in light of subsequent events -- turned out to be quite valuable. The defendant, like the respondent and the First Circuit here, argued that the court should blind itself to the subsequent events, and restrict plaintiff to "the value of the patent at the time of the breach." *Id.* at 697.

The Court rejected that argument. In a ruling equally applicable to the loss of a new business, the Court held that the plaintiff is entitled to "the value that would have been uncovered if he had kept it as his own." *Id.* at 699. That value "will not be known by first imagining a forced sale, and then accepting as a measure its probable results. The law is not so tender to sellers in default." *Id.*[8]

Notably, the Court in *Sinclair* effectively rejected not only a rule like the one adopted below but its rationale. In the panel's view, the reason for precluding the plaintiff from seeking recovery of lost future profits is that the estimation of such profits is presumptively "excessively speculative." Pet. App. 17a. But the passage of time, which the panel saw as a vice, was correctly recognized by this Court as a virtue:

> [A] different situation is presented if years have gone by before the evidence is offered. Experience is then available to correct uncertain prophecy. Here is a book of wisdom that courts *may not* neglect. We find *no rule of law* that sets a clasp upon its pages, and forbids us to look within.

---

[8]This Court has repeatedly affirmed awards of lost future profits. *See Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359, 376-79 (1927) (affirming lost profits award for four years exclusion from sub-market); *Palmer* v. *Connecticut Ry. & Lighting Co.*, 311 U.S. 544, 559-562 (1941) (approving lost profits award for eight years following injury).

Sinclair, 289 U.S. at 698 (emphasis added). Here, by contrast, the court of appeals has chosen to establish just such an unprecedented rule, and now presumptively requires courts and juries to neglect the wisdom of experience in favor "imagining a forced sale." *Id.* at 699.

2. Consistent with this Court's clear direction, the courts of appeals have routinely rejected litigants' attempts to confine the victims of anticompetitive conduct to damages calculated by "imagining a forced sale" at the time of the loss of a business rather than to lost future profits. In *Lehrman* v. *Gulf Oil Corp.*, 500 F.2d 659 (5th Cir. 1974), the Fifth Circuit affirmed the jury's lost profits award for 10 years after the plaintiff was driven out of business, and rejected the defendant's plea that "going concern value should be the only measure of damages, not future profits." *Id.* at 663; see *id.* at 663-64. The court reasoned that it would "more fully compensate a businessman by measuring *his* lost earnings, not just what it is worth to *someone else* to reach for those earnings." *Id.* at 664 (emphasis added).

Even more starkly opposed is the Fourth Circuit's decision in *Southern Pines Chrysler-Plymouth, Inc.* v. *Chrysler Corp.*, 826 F.2d 1360, 1363-64 (4th Cir. 1987) which the panel cited as a contrary reference but did not distinguish. See Pet. App. 17a. In *Southern Pines*, a plaintiff car dealership was driven out of business by the manufacturer's unlawful sales practices. The Fourth Circuit affirmed the jury's award of damages for projected lost profits from the time the plaintiff went out of business until a date "immediately preceding" trial, and also affirmed an award of the business's projected going-concern value "as of that date." *Southern Pines*, 826 F.2d at 1362, 1364. The fact that the business had failed several years prior to the going-concern value date was held not to bar this recovery. As the Fourth Circuit explained, "[s]everal federal

courts have reasoned [based on *Story Parchment* and its progeny] . . . that the plaintiff may recover his lost profits from the date he ceases doing business until a date at or near trial, and in addition his 'going-concern value' as of that date." 862 F.2d at 1364.[9] The district court's jury instruction -- held to be erroneous by the First Circuit -- is, once again, nearly a verbatim recitation of the rule set forth in *Southern Pines*. Compare *id.*, with page 8, *supra*.[10]

3. Finally, the First Circuit's decision merits review not only because the new legal presumption conflicts with *Story Parchment*, *Sinclair*, and the decisions of several circuit courts of appeals, but because the rule is arbitrary.

Here, for example, the panel has concluded that Coastal must, as a matter of law: (1) use a method of calculating

---

[9]*See, e.g. Arnott* v. *American Oil Co.*, 609 F.2d 873, 886 (8th Cir. 1979) (rejecting argument "that the proper measure of damages is the going concern value of a destroyed business," and affirming jury's award based on "loss of future profits"); *Fishman* v. *Estate of Wirtz*, 594 F. Supp. 853, 888 & n.23 (N.D. Ill. 1984) (citing *Sinclair*, rejecting argument that going-concern value is sole legitimate measure, and awarding lost future profits), *aff'd in relevant part*, 807 F.2d 520, 552 (7th Cir. 1986); *Terrell* v. *Household Goods Carriers' Bureau*, 494 F.2d 16, 23 n.12 (5th Cir.1974) (rejecting argument that "the proper measure of damages should have been the 'going concern' value of Terrell's business at the time of . . . destruction"); *cf.* R. Dunn, *Recovery of Damages for Lost Profits* 341-80 (5th ed. 1998).

[10]The court of appeals also erred in criticizing this same instruction (and implicitly the Fourth Circuit's holding in *Southern Pines*) as improper because it "could effectively be understood to tell the jury" to "assume" that "Coastal would have remained in business until 1998." Pet. App. 15a. Such an understanding -- which never occurred to CAPECO -- would have been dispelled by the very next sentence of the instructions: "The fact that I have instructed you on the proper measure of damages should not be considered as an indication of any view of mine as to whether you should grant any damages or not." *Id.* at 60a.

damages that all three economic experts, including respondent's expert, testified should be used only at a time of market stability; and (2) apply it at a time (April 1993) at which both parties' experts said the market was not stable. In short, the court of appeals is requiring Coastal to imagine the terms of a forced sale to an unknown third party at a time of market disequilibrium. This is hardly a recipe for avoiding speculation. "The law will make the best appraisal that it can, summoning to its service whatever aids it can command." *Sinclair*, 289 U.S. at 697. Where the experience of subsequent events is available, there is no reason to forbid a plaintiff from taking that experience into account in calculating damages.

*****

The First Circuit's constriction of the remedies available to antitrust plaintiffs that have proven that defendants have caused them to lose their business cannot be reconciled with the fundamental equitable principles that have guided this Court's jurisprudence for most of this century. The First Circuit's stark refusal to accord antitrust plaintiffs that have proven the fact of injury a lesser standard of proof of the amount of damages is also at war with the prior holdings of this Court and of other circuits. The First Circuit's decision in this important area of law therefore merits plenary review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Michael S. Yauch
Nine Greenway Plaza
Suite 822A
Houston, Texas 77046
(713) 877-6849

Theodore N. Miller
Mark E. Haddad*
SIDLEY & AUSTIN
555 West 5th Street
Los Angeles, California 90013
(213) 896-6604

Counsel for Petitioner
Coastal Fuels of Puerto Rico, Inc.

August 18, 1999

**Counsel of Record*